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24 **BEFORE THE**  
25 **CALIFORNIA STATE WATER RESOURCES CONTROL BOARD**

26 HEARING IN THE MATTER OF  
27 CALIFORNIA DEPARTMENT OF WATER  
28 RESOURCES AND UNITED STATES  
BUREAU OF RECLAMATION  
REQUEST FOR A CHANGE IN POINT OF  
DIVERSION FOR CALIFORNIA WATER  
FIX

**OBJECTIONS TO PETITIONERS'  
EVIDENCE**

1 These objections are submitted on behalf of protestants Local Agencies of the North  
2 Delta, Bogle Vineyards/Delta Watershed Landowner Coalition (“DWLC”), Diablo Vineyards  
3 and Brad Lange/DWLC, Stillwater Orchards/DWLC, Friends of Stone Lakes National Wildlife  
4 Refuge and Islands Inc. (“LAND et al. Protestants”). The LAND et al. Protestants lodge the  
5 following evidentiary objections to the testimony and other evidence submitted by Petitioners  
6 California Department of Water Resources (“DWR”) and United States Bureau of Reclamation  
7 (“BOR”) in support of their Petition for Change in Point of Diversion.

8 In order to reduce repetition of arguments for this complicated hearing, LAND et al.  
9 Protestants hereby join in, adopt and incorporate by reference the motions to disqualify  
10 Petitioners’ witnesses, motions to exclude Petitioners’ witnesses’ testimony, in whole or in part,  
11 and objections to Petitioners’ witnesses’ written testimony and exhibits, and the arguments and  
12 legal positions submitted by the Central Delta and South Delta Water Agencies, the Sacramento  
13 Valley Water Users, the County of San Joaquin, the Pacific Coast Federation of Fishermen’s  
14 Association, Restore the Delta, Save the California Delta Alliance, and the environmental  
15 coalition that includes Friends of the River, Sierra Club, Planning and Conservation League and  
16 Environmental Water Caucus.

17 **LAND et al. Protestants’ Objections**

18 Petitioners’ evidence fails to include the basic information required to support its  
19 proposed change in point of diversion, including the proposed diversion, release and return flow  
20 schedules and the identification “in quantitative terms of any projected change in water quantity,  
21 water quality, timing of diversion or use, consumptive use of the water, reduction in return  
22 flows, or reduction in the availability of water within the streams affected by the proposed  
23 change(s).”<sup>1</sup> (Cal. Code. Regs., tit. 23, §§ 794, subds. (a)(6), (a)(9).) Evidence submitted by

24 \_\_\_\_\_  
25 <sup>1</sup> LAND et al. Protestants also continue to allege that the current Petition is incomplete and  
26 is also improperly framed as a change in point of diversion under Water Code section 1701.  
27 Instead, the changes sought are of the character of a new water right under Water Code sections  
28 1250 et seq. LAND et al.’s Objections to the evidence offered in support of the petition for  
change in point of diversion do not waive these fundamental arguments regarding the  
fundamental flaws in the content and form of the petition sought by Petitioners. (See, e.g.,  
August 31, 2015 letter from LAND and CDWA regarding the incompleteness of the Petition;  
January 22, 2016, letter from LAND et al. Protestants regarding pre-hearing conference, noting  
that a new water right is being sought under the guise of a change petition; February 2, 2016

1 Petitioners fails to provide the necessary description of the changes being proposed, which  
2 would be necessary in order to evaluate whether legal users of water will be injured. Petitioners  
3 also fail to rebut the allegation made by LAND et al. Protestants and others that the Petition  
4 should, in fact, be framed as a petition for a new water right. (See, e.g., DWR-53, pp. 9-10.)  
5 General references to unscientifically accepted and flawed modeling results from two  
6 “boundary” scenarios—neither of which represents operations under the proposed changes<sup>2</sup>—  
7 fails to meet basic informational requirements for a petition.

8         Though an administrative hearing is not conducted according to technical rules relating to  
9 evidence and witnesses, relevant evidence must be “the sort of evidence on which responsible  
10 persons are accustomed to rely in the conduct of serious affairs.” (Gov. Code, § 11513, subd.  
11 (c); see also *Aengst v. Board of Medical Quality Assurance* (1980) 110 Cal.App.3d 275, 283  
12 [evidence must be relevant and reliable].) The standard for determining the admissibility of  
13 scientific evidence in an administrative proceeding is the same in an adjudicatory hearing as in a  
14 judicial proceeding. (*Seering v. Department of Social Services* (1987) 194 Cal.App.3d 298,  
15 310.) The standard for determining the admissibility of scientific evidence under the “Kelly” or  
16 “Kelly-Frye” standard, requires that the methodology and results of the scientific procedure be  
17 generally accepted by the relevant scientific community at the time the scientific evidence is  
18 offered into evidence. Despite the gravity of the changes proposed to the most important and  
19 stressed waterways of California, Petitioners’ proffered evidence fails to meet this basic  
20 standard of general acceptance by the relevant scientific community, and should therefore be  
21 excluded. (See, e.g., DWR 71, pp. 7-13 [incorrectly claiming models relied upon are “state of  
22 the art”].)

23         With respect to injury caused by the water quality and water level changes that would  
24 occur if the Petition is granted, Petitioners have failed to provide any analysis upon which a  
25 responsible person could rely. For instance, with respect to water quality, Petitioners make  
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27 letter from Contra Costa County and LAND regarding incompleteness of Petition due to  
28 modeling problems; March 29, 2016 coalition letter regarding continuing incompleteness of the  
Petition.)

<sup>2</sup> See, e.g., DWR-51, p. 10; DWR-71, pp. 14-15.

1 generalized claims that the changes would not result in any injuries. (See, e.g., DWR-66, p. 5.)  
2 The material referenced in support of this assertion, however, is irrelevant and cannot be relied  
3 upon because the referenced models are not reliable and have not been generally accepted in the  
4 scientific community. As discussed above, the boundaries used in the “analyses” also do not  
5 reflect proposed operations or compliance with existing regulatory requirements.<sup>3</sup> Moreover,  
6 water quality is discussed in terms of monthly averages (DWR-66, p. 5; DWR-513, Figures EC-  
7 1 EC-4), which do not reflect real time water quality injuries to legal water users. Despite  
8 having listed all of the potentially affected water rights in Attachment C to the addendum and  
9 errata in Petitioners’ September 11, 2015, submittal to the SWRCB, Petitioners include no  
10 information in their case in chief regarding specific impacts and/or injuries to these water rights.  
11 Additionally, the LAND et al. Protestants (and others) included specific diversion information  
12 that Petitioners fail to address in their case in chief. The water quality to which the LAND et al.  
13 Protestants currently have a right, nor the specific changes in water quality that would occur to  
14 the diversions at issue in this proceeding, should the Petition be granted, are not described or  
15 even discussed in general terms.

16 With respect to water level changes, the evidence submitted by Petitioners merely  
17 discusses a range of water level changes that may be experienced in very generalized locations.  
18 (See DWR-66, pp. 3, 9-10.) As discussed above, Petitioners have access to specific diversion  
19 information for which they are obligated to demonstrate that there will be no injury. (Water  
20 Code, § 1702.) Yet Petitioners provide no information regarding the effects of water level  
21 changes on specific diversions included in protests despite the ready availability of this  
22 information.

23 Petitioners’ claims that temporary and permanent interference with the use of existing  
24 water diversions under the footprint of the newly proposed and massive structures are far too  
25 general to be of any use in ensuring that injuries to water rights are entirely avoided. (See., e.g.,  
26 DWR-57, pp. 13-15; DWR-2, DWR-3.) Vague promises to provide replacement water supplies  
27 for diversions that will be literally destroyed by the proposed change is not no injury. As the  
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1 locations and uses of these diversions are already known to Petitioners, a far more specific  
2 program of avoidance and mitigation would be necessary to potentially reach the threshold of no  
3 injury. As Petitioners' vague promises are entirely unreliable, they should be disregarded in  
4 their entirety.

5 Petitioners also claims that grant of the Petition would somehow "restore and protect  
6 ecosystem health" among other claims. (DWR -51, p. 5.) No information in support of this bald  
7 assertion is provided. As this information is misleading considering the currently proposed  
8 project description, which does not include any ecosystem restoration (there is only mitigation  
9 for project impacts), it should be excluded.

10 As a result of Petitioners' failure to provide credible and scientifically accepted evidence  
11 upon which a responsible person could rely in support of its claim that legal users of water  
12 would not be injured by the proposed change, Petitioners' evidence should be excluded in its  
13 entirety. Should Petitioners wish to resubmit a complete petition for a change in water rights,  
14 and adequately support that petition with reliable and scientifically accepted evidence, that  
15 petition could be considered at a later date. The LAND et al. Protestants thus object to all  
16 evidence and testimony submitted and object to the Hearing Officers' consideration of it for  
17 purposes of this proceeding, including DWR-1 through DWR-515 and DOI-1 through DOI-32.

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1 **Joinder in Objections**

2 The LAND et al. Protestants hereby join in and incorporate fully by reference the  
3 objections submitted by Sacramento Valley Water Users on July 8, 2016.

4 \* \* \*

5 Respectfully submitted,

6 Dated: July 12, 2016

SOLURI MESERVE,  
A LAW CORPORATION

7  
8 By: 

9 Osha R. Meserve  
10 Attorney for Protestants  
11 Local Agencies of the North Delta  
12 Bogle Vineyards/DWLC  
13 Diablo Vineyards and Brad Lange/DWLC  
14 Stillwater Orchards/DWLC  
15 Friends of Stone Lakes National Wildlife Refuge  
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1 **STATEMENT OF SERVICE**

2 **CALIFORNIA WATERFIX PETITION HEARING**  
3 **Department of Water Resources and U.S. Bureau of Reclamation (Petitioners)**

4 I hereby certify that I have this day submitted to the State Water Resources Control  
5 Board and caused a true and correct copy of the following document(s):

6  
7 to be served by **Electronic Mail** (email) upon the parties listed in Table 1 of the **Current**  
8 **Service List** for the California WaterFix Petition Hearing, dated July 11, 2016, posted by the  
9 State Water Resources Control Board at  
10 [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfi](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml)  
11 [x/service\\_list.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/service_list.shtml)

12 I certify that the foregoing is true and correct and that this document was executed on  
13 July 12, 2016.

14 Signature:  \_\_\_\_\_

15 Name: Mae Ryan Empleo

16 Title: Legal Assistant for Osha R. Meserve  
17 Soluri Meserve, A Law Corporation

18 Party/Affiliation:

19 Local Agencies of the North Delta

20 Bogle Vineyards/DWLC

21 Diablo Vineyards and Brad Lange/DWLC

22 Stillwater Orchards/DWLC

23 Friends of Stone Lakes National Wildlife Refuge

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